85-570

Supreme Court, U.S.
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No. 85-.....

IN THE

Supreme Court of The United States

OCTOBER TERM, 1985

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REYNOLDS, ALLEN COOK
Incorporated
THOMAS D. CORDELL
JOE H. REYNOLDS
J. BRUCE BENNETT
KAY K. PIERCE
3300 Allied Bank Plaza
Houston, Texas 77002
(713) 651-1300
Attorneys for Petitioner

October 4, 1985

12 pgs

QUESTIONS PRESENTED

1. Whether Texas State District Judge Dee Brown Walker acted in the clear absence of jurisdiction within the meaning of *Stump* v. *Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed.2d 331 (1978), when he continued to hold Petitioner's corporation, Humble Exploration Company, Inc., in receivership after the Texas Court of Appeals at Dallas issued a Writ of Prohibition against Judge Walker expressly informing him that he "had no jurisdiction to conduct a continuing, ongoing receivership of Humble Exploration Company, Inc., or its property, assets and business."

2. Whether Petitioner's allegations that a private agreement existed between Judge Walker and the other defendants below to decide, in advance of trial or of judgment, the outcome of the case against Petitioner shows the commission of a nonjudicial act within the meaning of *Stump* v. *Sparkman*.

3. Whether Judge Walker lost his judicial immunity by violating his ministerial duty to obey forthwith the orders of the Texas Court of Appeals at Dallas "to absolutely desist and refrain from taking or permitting any further action or proceeding in the receivership of Humble Exploration Company, Inc., or any of its property, assets and business . . . ."

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 765 F.2d 517 (5th Cir. 1985). The order of the District Court is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1985. The Petitioner timely filed a Suggestion for *En Banc* Consideration. On September 4, 1985, this Suggestion was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On November 18, 1982, Petitioner Pat S. Holloway along with Humble Exploration Company, Inc., and Sterling Pipeline Corporation, the stock of which is wholly owned by Petitioner, filed a complaint under 42 U.S.C. § 1983 against Texas State

District Judge Dee Brown Walker and the other defendants below alleging a conspiracy to violate Petitioner's federal constitutional rights, and seeking monetary, injunctive, and declaratory relief against all defendants, jointly and severally.

On December 7, 1982, Judge Walker filed a motion to dismiss the complaint on the ground that the doctrine of judicial immunity barred suit against him. On August 21, 1984, the District Court denied Judge Walker's motion to dismiss, holding that the complaint sufficiently alleged facts showing that Judge Walker had committed certain nonjudicial acts thereby forfeiting his judicial immunity. Judge Walker appealed from the District Court's order of denial, and on April 9, 1985, Judge Walker's appeal was orally argued before the Fifth Circuit.

On July 18, 1985, a split panel of the Fifth Circuit rendered its decisions. The majority opinion held that all of the wrongful actions taken by Judge Walker were not performed in the clear absence of all jurisdiction; that the Fifth Circuit would not follow the Ninth Circuit case of *Rankin* v. *Howard*, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939, 101 S. Ct. 2020, 68 L. Ed.2d 326 (1981), which holds that a judge forfeits his judicial immunity if, prior to trial or judgment, he privately agrees to decide a case in favor of one party; and that Judge Walker's appeal from the denial of his motion to dismiss was appealable under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). Judge Johnson, in a dissenting opinion, wrote that the District Court's denial of Judge Walker's motion to dismiss should be affirmed because "the Plaintiffs have sufficiently alleged acts committed after the Texas Court of Appeals' mandamus order which were 'in the clear absence of all jurisdiction.' *See Stump* v. *Sparkman*, 435 U.S. 349, 357, 98 S. Ct. 1099, 1105, 55 L. Ed.2d 331 (1978)."

REASONS FOR GRANTING THE WRIT

First. In *Stump* v. *Sparkman*, this Court recognized that a judge of a court of general jurisdiction, like Judge Walker, loses his immunity if he considers matters over which his jurisdiction has been foreclosed or circumscribed by case law or by statute. 98 S. Ct. at 1105-06. If Judge Stump had considered the sterilization petition and ordered the child sterilized even after an Indiana appellate court had expressly told him that he had no jurisdiction to act on those matters, then Judge Stump would have been held personally responsible in damages to the child. In holding that Judge Walker did not act in the clear absence of jurisdiction, even though a Texas appellate court expressly told him that he had no jurisdiction to keep Petitioner's corporation, Humble Exploration Company, Inc., in receivership, the Fifth Circuit has clearly misconceived the meaning of the decision in *Stump*.

The Fifth Circuit's holding in this case is not only in conflict with *Stump* but also in conflict with its prior decision in *Turner* v. *Raynes*, 611 F.2d 92, 95 (5th Cir. 1980), *cert. denied*, 449 U.S. 945, 101 S. Ct. 269, 66 L. Ed.2d 129 (1980) and with the Ninth Circuit's decision in *Rankin* v. *Howard*, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939, 101 S. Ct. 2020, 68 L. Ed.2d 326 (1981). In *Turner*, the Fifth Circuit, citing *Stump*, stated: "A clearly inordinate exercise of unconferred jurisdiction by a judge—one so crass as to establish that he embarked on it either knowingly or recklessly—subjects him to personal liability." In *Rankin*, the Ninth Circuit, relying both on *Stump* and *Turner*, held that a judge forfeits his immunity when he "knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction . . . ." 633 F.2d at 849.

In reaching its decision, the Fifth Circuit has also misinterpreted the opinion of the Texas Court of Appeals at Dallas, wherein it issued the Writ of Prohibition against Judge Walker.

Humble Exploration Company, Inc., v. *Walker*, 641 S.W.2d 941 (Tex. App. — Dallas 1982, writ ref'd n.r.e.) The Fifth Circuit reasoned that the Texas Court of Appeals did not hold that Judge Walker had no subject matter jurisdiction, but instead held that Judge Walker was acting in excess of his jurisdiction. In its opinion, however, the Texas Court of Appeals expressly stated that the question before it was whether Judge Walker was acting "in the *absence* of jurisdiction." (Emphasis added.) The Texas Court of Appeals then held that "the trial court [Judge Walker] was *without jurisdiction* to continue the receivership following our order." (Emphasis added.) As these statements plainly demonstrate, the Texas Court of Appeals indisputably held that Judge Walker had *no* jurisdiction to act—not that he had merely exceeded his jurisdiction.

Second. The Fifth Circuit acknowledged that the Ninth Circuit in *Rankin* had held that a judge's prior private agreement to decide in favor of one party is not a judicial act. Nevertheless, the Fifth Circuit expressly refused to follow *Rankin* declaring: "This Court does not follow *Rankin*" because it is "inconsistent with the fundamental policies underlying judicial immunity."[1]

Petitioner would respectfully submit that this conflict among the Fifth and Ninth Circuits should be resolved by this Court. The key issue that this Court should resolve is whether a judge should be permitted to hide beneath the cloak of judicial immunity when specific allegations of a conspiracy between the judge and others to rig a case are clearly and specifically alleged by a plaintiff in a federal civil rights complaint. This issue is of undeniable public and professional importance.

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[1] In criticizing *Rankin*, the Fifth Circuit placed great reliance upon *Dennis* v. *Sparks*, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed.2d 185 (1980), but failed to acknowledge in its citation of *Rankin* that this Court had refused a writ of certiorari in *Rankin* following its decision in *Dennis*.

Third. The Fifth Circuit's disposition of this case also conflicts with this Court's opinion in *Ex Parte Virginia*, 100 U.S. 339 (1879), which holds that a judge loses his immunity when he violates a ministerial duty.[2] Judge Walker had a ministerial duty to obey the order of the Texas Court of Appeals commanding him to discharge Petitioner's corporation, Humble Exploration Company, Inc., from receivership proceedings. Judge Walker, however, willfully defied that order and continued to keep Humble in receivership. This Court should decide the issue of whether immunity should be accorded a judicial officer who refuses to obey his ministerial duty to execute orders of an appellate court in order to injure others. The opinions of the Texas Court of Appeals, particularly its opinion of August 30, 1982, wherein the Writ of Prohibition was issued against Judge Walker, clearly raise this issue, for the August 30, 1982, opinion told Judge Walker that he had no jurisdiction; it defined his duty in clear and precise language; and it ordered him to discharge that duty immediately, which he knowingly refused to do.[3]

CONCLUSION

This Court is presented with the unparalleled conduct of a judge who openly and willfully defied orders of an appellate court informing him not only that he had no jurisdiction to act in proceedings pending in his court but further commanded him to terminate those proceedings immediately. This Court is also presented with a situation where the District Court below has held that there is competent summary judgment evidence that Judge Walker and an attorney for one of the defendants were privately conspiring to deprive Petitioner of a fair trial. It must

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[2] The common law has never accorded a judge judicial immunity for violating a ministerial duty. See 2 HARPER & JAMES, THE LAW OF TORTS, at 1645-46 (1956). *Sassower* v. *Finnerty*, 465 N.Y. Supp.2d 543 (N.Y.A.D.-Dept. 1983). *Cf. Amy* v. *The Supervisors*, 78 U.S. (11 Wall) 136, 138 (1870); *Roberts* v. *United States Ex Rel. Valentine*, 176 U.S. 221, 231, 20 S. Ct. 376, 379-80 (1900).

[3] See *Mower* v. *Fletcher*, 114 U.S. 127 (1885).

be noted that Petitioner has satisfied all the procedural hurdles heretofore erected by the federal courts to weed out frivolous and questionable claims of wrongdoing by judges. Yet the Fifth Circuit, by misunderstanding *Stump*, has changed the rules, created a conflict in the Circuit Courts, and placed before Petitioner a new hurdle that is plainly contrary to *Stump*.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that a Writ of Certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

REYNOLDS, ALLEN & COOK
Incorporated

By Thomas D. Cordell

THOMAS D. CORDELL
JOE H. REYNOLDS
J. BRUCE BENNETT
KAY K. PIERCE
3300 Allied Bank Plaza
Houston, Texas 77002
(713) 651-1300

Attorneys for Petitioner
PAT S. HOLLOWAY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by certified mail, return receipt requested, this 4th day of October, 1985, upon Mr. Bruce W. Claycombe and Mr. Morgan A. Jones, of Jones & Claycombe, Attorneys for Respondent, 2626 LTV Tower, 1525 Elm Street, Dallas, Texas 75201.

Thomas D. Cordell

THOMAS D. CORDELL